foreman to Flint to inspect the equipment but no sale resulted from these negotiations. Petitioner ultimately paid Feiler the expenses incurred by the latter in the course of conducting these negotiations (App. 453a).

Sometime in 1951 or 1952, petitioner telephoned Dr. Feiler to request information relative to a patent infringement action concerning contact lens. As a result, Feiler came to Chicago to discuss the matter (App. 175-6). Feiler and his attorney offered to sell petitioner information thought relevant to the patent suit for the sum of $10,000.00, but the offer was refused. However, Feiler was paid his expenses (App. 176a, 236a, 455a).

On November 1, 1951, Governor Williams appointed Feiler to the Michigan Board of Examiners in Optometry.

In 1952 or 1953, Feiler again visited petitioner in Chicago and he testified that petitioner requested him to inspect petitioner's contact lens laboratory and render technical advice with respect to its operation, for which he received Three Hundred and Fifty ($350.00) Dollars for his professional services on that date (App. 178a). Feiler did not consider this transaction as conflicting with his duties as a member of the Board. Petitioner denied that he requested technical assistance from Feiler but asserted that Feiler had extorted this money from petitioner by reason of his official position vis-a-vis petitioner's business interests in Michigan (App. 459a).

The next contact between Feiler and petitioner occurred in 1953 (App. 178a, 460a). Feiler testified that this meeting was arranged in Chicago for the purpose of brokering a sale of lenses by a Detroit Optometrist to petitioner. Feiler admitted that he received expense money from petitioner in connection with this meeting (App. 178a, 179a,

180a) but petitioner testified that Feiler threatened to put him out of business in Michigan unless petitioner paid him Five Hundred ($500.00) Dollars (App. 459a-462a, 607a-610a).

The next contact between Feiler and petitioner occurred in November 1954, as a result of a telephone call allegedly initiated by petitioner, in the course of which petitioner asked Feiler whether he "could do anything about" the Sanchick case. Feiler replied that he "could not do anything", but did not report the incident to anyone (App. 180a, 181a). No money or other thing of value was mentioned. Petitioner testified that Feiler had called him and threatened revocation of licenses of other optometrists allied with petitioner unless petitioner paid Feiler Fifteen Thousand ($15,000.00) Dollars, which petitioner refused to do (App. 470a).

The next contact occurred during the first week of January, 1955, at which time Feiler testified that petitioner called him from Chicago and told Feiler that "* * * it would certainly be worth some money to see that the case were (sic) washed up or washed out, that it wouldn't be worth 3 or 4 hundred dollars but that I could put a zero behind that." Feiler reiterated that he couldn't do anything about the case; but despite Feiler's negative attitude, a Detroit meeting was arranged for the following week (App. 181a, 182a). Petitioner testified that Feiler had initiated the call and requested petitioner to meet Feiler in Detroit on January 12, 1955; that the meeting was "urgent", but the purpose was not articulated (App. 471a, 472a).

This conversation was the first one reported by Feiler to Michigan Police authorities who thereafter arranged with Feiler for monitoring the projected meeting (App. 182a-185a). In the course of preparation for this meeting

Feiler was advised by State Police officials to be "very normal in this relationship * * * not do anything that would entrap Mr. Ritholz * * *" (App. 185a). Petitioner came to Detroit and met with Feiler on January 12, 1955 at a Detroit hotel. The conversation was monitored by the State Police.

In the course of this conversation, petitioner asked Feiler if he would "wash this out (the Sanchick case) just like anything else," and that since petitioner would have to pay attorneys if it was not worked out, he would agree to pay Feiler the amount saved (App. 188a). Respondent interpreted this conversation as revealing petitioner to be the aggressor—bribor. Petitioner contended that he had decided to capitulate to Feiler's previous extortionate demands, and thus ensure that Feiler's threats to destroy petitioner's business by effecting revocation of licenses of optometrists associated with petitioner in Michigan would not be consummated; that he had suggested that the Sanchick case be "worked out" because he believed that the complaint had been originally promoted by Feiler only for the purpose of furnishing bargaining power for later extortion.[4]

No arrest was made following this monitored conversation.

Feiler testified that on March 27, 1955, while the Board was holding an official meeting, petitioner phoned to tell him that he would be in Detroit later that day and asked Feiler to meet him to discuss the Sanchick case. Drs.

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[4] Petitioner testified that, after appointment to the Board, Feiler met Ritholz in Chicago and said: "As a member of the Board I could do you a lot of good and a lot of harm" (App. 458a). Petitioner refused to pay Feiler any money (App. 465a). The Board subsequently filed its complaint against Dr. Sanchick in September, 1954 (App. 470a).

Howe and Grigware were in Feiler's room when petitioner called and Feiler reported the call to them (App. 193a-194a).[5]

Feiler later went to petitioner's hotel room where petitioner again allegedly asked Feiler to "work out" the Sanchick case and told Feiler it would be worth a thousand dollars.[6] Feiler again stated he could do nothing for petitioner (App. 195a). Petitioner requested a meeting for the next day. Feiler returned to his hotel and contacted the Michigan State Police and was advised by them, "not to have any further contact with Mr. Ritholz" (App. 195a).

The following day, petitioner called Feiler and asked for a meeting to discuss the Sanchick case. Feiler again stated he could do nothing but told petitioner that he would be shopping at a named store. There he met petitioner and accepted Five Hundred ($500.00) Dollars from petitioner without thereafter reporting it until September 20, 1955, more than a month after petitioner's arrest on August 8th (App. 197a-200a).[7] Petitioner testified that

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[5] The minutes of this meeting disclose the efforts of the Board to defeat legislation relative to "capping and steering" favorable to the King Optical Company. Petitioner was expressly mentioned in this connection in the minutes, in a way which suggests that the Board was hostile to proposed legislation favored by petitioner, affecting the regulation of the practice of optometry (App. 168a, 169a).

[6] Petitioner was apparently the beneficiary of a falling market. In earlier testimony Feiler stated that petitioner had offered $3,000 or $4,000 on January 5, 1955 (App. 182a).

[7] For this default Feiler was ultimately removed from office by Governor Williams (Supplemental Brief and Appendix for Appellant, p. 58. This document is included in the certified record.)

Feiler had demanded the Five Hundred ($500.00) Dollars to "swing" a vote on the five man Board and that he had acceded to this demand (App. 479a-480a).[8]

When asked why he had arranged to see petitioner the day after he had been told by the State police not to contact him further, Feiler replied:

> "• • • We had previous evidence on him, and I wanted to get him, if I could, and this was just a method of having him on the hook and letting out the line a little bit and playing him until we finally would catch him, which we did, fortunately." (Appellant's Supplemental Brief and Appendix pp. 40sa-41sa.)

Feiler testified that petitioner next contacted him in Flint by phone from Chicago in early June, 1955 again asking Feiler to "work out" the Sanchick case. Feiler advised petitioner that he couldn't do anything and suggested that petitioner call "another member of the Board or other members of the Board, if he wanted something done" (App. 203a). Feiler explicitly suggested the name of Board member Dr. Grigware (App. 204a).

The next (and last) meeting between Feiler and petitioner, prior to petitioner's arrest, occurred on August 8, 1955, in a Lansing Hotel. According to Feiler, the meeting was preceded by a number of phone calls from petitioner in which petitioner continued to ask Feiler to work out the Sanchick case, but no money was mentioned and on each occasion Feiler advised petitioner that he could do nothing (App. 206a, 207a). Feiler reported these phone calls to the State Police.

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[8] Petitioner testified that Feiler had apprized him of the possibility of coopting at least one member of the Board, at the September 1955 Chicago meeting (App. 465a).

On August 3, 1955, Feiler and Board member Howe, were summoned to a conference at Lansing, the State Capitol, by Assistant Attorney General Irving Beattie. At this conference a detailed plan was outlined for entrapping petitioner. Beattie specifically instructed the conferees "* * * we didn't have to be too careful about entrapment" (App. 410a).

Pursuant to the plan, Feiler telephoned petitioner in Chicago and informed him "I think I'm getting this thing lined up", then by way of soliciting a meeting with petitioner, asked him "When can we meet?" (App. 420a). Petitioner suggested a Detroit meeting for August 7th and Feiler then asked if petitioner "was going to bring the stuff with him." There was discussion about a "middle man" and Feiler said: "Bring the money with you. I do not want a middle man. I am the middle man" (App. 211a, 420a, 435a).

It was in this conversation that Feiler suggested the payment of a specific sum of money to bribe a majority of the Board. He testified:

> "Q. I see. All right. Now, did you mention any sum of money in your talk with Mr. Ritholz over the phone?
>
> A. I believe that I did, sir.
>
> Q. Did you do that at the suggestion of anyone?
>
> A. Yes, sir.
>
> Q. By whom? Who made that suggestion?
>
> A. Mr. Beattie.
>
> Q. And you mentioned a sum of money, right?
>
> A. Yes, sir.
>
> Q. Did you mention the sum of money that was to be paid to you by Mr. Ritholz?
>
> A. I believe *I mentioned the sum of money that would have to be paid to the Board members.*
>
> Q. To the Board members?
>
> A. Yes, sir.

Q. And what was that sum of money that you mentioned in that telephone conversation, based upon your best recollection?

A. To the best of my recollection now, *I stated that each Board member or the three Board members were to receive $3,000.00 each.*

Q. And a total of $9,000.00?

A. To the best of my recollection, yes, sir" (App. 283a, 284a). (Emphasis added.)

Petitioner testified that the next day, August 4th, he again spoke with Feiler by long distance telephone concerning the dismissal of a Federal Court anti-trust case instituted by petitioner against members of the Board; that Feiler agreed it should be included as a part of the deal; and that Feiler reminded petitioner to bring the $9,000—$3,000 for each Board member (App. 488a). When petitioner complained, Feiler said the "boys" (Board members) had originally wanted $5,000 each but that Feiler had been able to reduce their demands (App. 488a).

Feiler's testimony on this August 4th call agrees in substance with petitioner's but does not include any mention of specific money amounts (App. 212a).

On August 5th, petitioner called Feiler and, according to Feiler, asked that the other two members who, together with Feiler constituted a majority of the Board, be present at the projected August 7th meeting, and that Feiler disclose their identity to petitioner, but Feiler refused to identify the other members (App. 213a).

On August 7th, in another monitored phone conversation with Beattie and the State Police present, Feiler called petitioner in Detroit to advise him that the other members of the Board could not be in Detroit and agreed to meet petitioner the following night in the Olds Hotel in Lansing (App. 214a, 215a).

Assistant Attorney General Beattie and the State police thereupon summoned Board members Grigware and Howe to Lansing where the latter were briefed as to their roles at the meeting with petitioner.[2] They were instructed in substance "* * * if possible get Mr. Ritholz to pay us some money, and as soon as you get it, to go to the room where the officials were and show it to them" (App. 59a) and that they "did not have to be too careful to entrap" (App. 290a).

On August 5, 1955, petitioner had contacted Pinkerton detectives, told them "that he was anticipating somebody extorting money from him", and employed them to tape record the meeting. This they did by placing a tape recorder under the supervision of three Pinkerton operatives in the hotel room adjacent to petitioner's[3] (App. 45a, 347a-350a).

At the hotel meeting petitioner gave Feiler three one hundred dollars bills; the latter then gave one each to Howe and Grigware, with the understanding that the three Board members would terminate proceedings against Sanchick. The Board members then left petitioner's room, reported to the police in an adjacent room, and the latter then arrested petitioner in his room and, in response to petitioner's demand to know the reason for his arrest, told him that the charge was bribing State officials. Petitioner responded: "It should have been the other way"

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[2] Dr. Howe of Hillsdale, Michigan, repeatedly refused State police and Attorney General efforts to bring him to Lansing for the meeting with petitioner and acquiesced only after three calls from different State officials (App. 129a, 130a).

[3] After contacting the Pinkertons, petitioner consulted Mr. Marcus Simon, a Detroit attorney as to the propriety of taking recordings to obtain evidence of Feiler's extortion and Mr. Simon told him "go ahead" (App. 617a).

(App. 493a). Petitioner advised the police of the presence of three Pinkerton detectives in the adjoining room. The police first placed the detectives under arrest but, on ascertaining their identity, released them but confiscated the recording machine and equipment (App. 54a).

HOW THE FEDERAL QUESTION WAS RAISED

At the trial the issue of entrapment was raised and considerable evidence was introduced in support of the claim (note extensive citations to the record supporting petitioner's claim of entrapment in the Statement of the Case).

Although the Trial Judge gave a request to charge to the jury on the issue of entrapment (App. 677a-678a), the matter was not argued to the jury by petitioner's counsel. Instead, he stated to the Court "We will claim that (defense of entrapment), your Honor, even though we didn't argue it" (App. 671a).

On appeal to the Michigan Supreme Court, petitioner raised the defense of entrapment as a due process issue in the Statement of Questions Involved in his brief, as required by Rule 67 of the Michigan Court Rules (App. Brief on Appeal p. v, par. 6), and presented extensive arguments in support thereof (App. Brief on Appeal pp. 114-126).

In the Counter-Statement of Questions Involved in respondent's brief in the Michigan Supreme Court, pursuant to Rule 68 of the Michigan Court Rules, the issue was stated as follows: "10. Was the defendant deprived of due process of law, because, as he claimed, there was * * * entrapment by police and prosecuting officials * * *" (Appellee's Brief and Appendix p. VII). The argument upon this issue appears on pp. 79-84 of the same brief.

In its opinion, the Michigan Supreme Court neither discussed nor decided the entrapment issue. It ignored it. Consequently, petitioner in his Application for Rehearing to the Michigan Supreme Court, pointed out that the entrapment issue as a denial of due process was not passed upon by that Court and requested consideration. (Application for Rehearing pp. 2-10). The Michigan Supreme Court denied the Application for Rehearing without opinion.[11]

REASONS FOR GRANTING WRIT

The facts in this case disclose that petitioner, engaged in a competitive business involving the manufacture and sale of eyeglasses, was threatened with destruction of his business by his competitors sitting as members of a State Board which regulated and licensed the optometrists whose good will was essential to the continuation of his business. For this was the significance of the revocation proceedings instituted by the Board against Dr. Sanichick.

Not only did the Board charge that Dr. Sanichick was guilty by reason of his relationship with the King Optical Company in prescribing glasses to customers referred by King, but implicit in the charge was the threat that any optometrist in Michigan who prescribed glasses for customers referred by King would be similarly dealt with. Although the Michigan Supreme Court ultimately found

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[11] The issue of entrapment, though not discussed by the Michigan Supreme Court, must have been decided adversely to petitioner, since a decision on this issue favorable to petitioner, would have resulted in a reversal of his conviction. This Court has the duty to examine the record independently to "determine whether the federal question was necessarily passed upon by the State Court." *Honeyman v. Hanan*, 300 U. S. 14, 18, 57 S. Ct. 350; *Napue v. Illinois*, 360 U. S. 264, 271-2, 79 S. Ct. 1173.

that the relationship was not in violation of the law (*In re Sanchick, supra*), it is understandable that, *at the time*, petitioner would be concerned that his competitors' economic power exercised through a state agency which, by statute, was controlled by these same competitors, could result in the destruction of his business.[12]

It is in this context that petitioner's overtures to Feiler (or, as petitioner asserted, Feiler's overtures to petitioner) must be judged in relation to his claim of entrapment. Although the testimony as to petitioner's suggestion to Feiler for washing out the charges against Dr. Sanchick (as testified to by Feiler) were crude and assertive, they were never of such a character as to constitute bribery. If they had been, it is clear that criminal proceedings would have been brought against petitioner in January, 1955. For it was then that the police had monitored the conversation between petitioner and Feiler at a hotel room in Detroit, where petitioner asked that the Sanchick case be washed out and that he would pay Feiler the amount saved as attorney fees if this were done.

Yet, it was not until after the hotel meeting of August 8, 1955, that the police and the Attorney General concluded that petitioner could be charged with bribery. The change in character between the two meetings, we submit, lies in the criminal ingredients which the State introduced into

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[12] The Board has no jurisdiction over dispensing opticians such as King. For this reason King can engage in advertising the price of glasses but optometrists such as Dr. Sanchick are not permitted to do so. In this situation, if optometrists could be intimidated into refusing to accept referrals from King, the Board would be able to economically blockade King and accomplish indirectly what, by statute, it could not do directly. The *Sanchick* record at p. 216 (*In re Sanchick, supra*) shows that the Board's investigation of Dr. Sanchick in August, 1954 was "primarily for the purpose of trying to obtain enough evidence for a court case against King Optical Company."

the August meeting in order to entrap petitioner into the commission of the crime.

Petitioner's overtures to Feiler in the January hotel meeting, as well as in conversations prior to and subsequent thereto, were understandable reactions of a businessman being pushed to the wall by his economic competitors in a power move directed from the vantage point of State authority (disregarding the motive of extortion unsuccessfully advanced by petitioner). Foolish and amateurish though this overture may have been, it was not bribery.

It was in recognition of this lack of criminal action by petitioner, that the Assistant Attorney General advised the Board members on August 3rd and 7th, in preparation for the meeting of August 8th, "we didn't have to be too careful about entrapment." It would be difficult to find better evidence, than this statement, of knowledge by the State that a citizen would not violate a law if left to his own devices, but that he could be made to engage in the criminal act only through entrapment.

Three ingredients were deemed necessary by the Michigan Attorney General to entrap petitioner: First, to bring him into Michigan; second, to have him offer a specific sum of money; and third, to bring in Board members other than Feiler as willing to accept bribes.[13]

It was in accord with this strategy that Feiler, at the direction of the Assistant Attorney General, phoned petitioner in Chicago on August 3rd. First, he asked petitioner to a meeting in Michigan; then, holding out the lure

[13] Feiler had first suggested in May that petitioner "call another member of the Board, or other members of the Board if he wanted something done * * * I suggested that he call Dr. Grigware" (App. 203a, 204a).

of business security against economic strangulation represented by the Sanchick case, he informed him that three Board members, a majority, were ready to accept $3,000 each to dismiss the proceedings.

The trap was now baited with a Board majority of three members willing to accept money and dismiss the charges against Sanchick. It was this trap which the State sprung on petitioner. The State provided the stage-set, the actors and the props for the commission of the crime, and the petitioner reacted in accordance with the prearranged script.

The play that had proved to be a farce when enacted in the monitored hotel room in Detroit in January, became a tragedy after the script had been rewritten in another monitored hotel room in Lansing in August by an Attorney General whose guide was: Don't "be too careful about entrapment."

Much emphasis is placed by the State upon petitioner's payment to Feiler of Five Hundred Dollars in March, 1955. But two considerations militate against this incident constituting an answer to petitioner's claim of entrapment.

First, on the previous day at a meeting of the Board, Feiler was instructed by the State Police and by the Board itself "not to have any further contact with Mr. Ritholz" (App. 195a). Yet Feiler not only received Five Hundred Dollars from petitioner on the day following receipt of these instructions, but he retained the money without notifying anyone until September, six months after he had received the money and a month after petitioner's arrest (App. 200a). This conduct on the part of Feiler is completely inconsistent with the State's position that Feiler

was at all times acting as a decoy for a potential bribor; rather it supports petitioner's claim of extortion.[14]

Second, the State police and the State prosecuting official who joined together to entrap petitioner were unaware of the payment of this $500.00 when they made and carried out their plan. If it is the improper action of the police rather than the motivation of the defendant which is condemned by the invocation of the entrapment doctrine, then the State may not invoke an incident of which it knew nothing to provide *ex post facto* justification for its illegal acts. This indeed is the meaning of the concurring opinions in *Sherman v. U. S.*, 356 U. S. 369; 78 S. Ct. 819, and *Sorrells v. U. S.*, 287 U. S. 435; 53 S. Ct. 210.[15]

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[14] This Court need not reject the Jury's verdict to believe petitioner's testimony relative to extortion by Feiler before June 1955. This is so because, although the trial Court sent the petitioner's claim of extortion to the jury on the question of petitioner's intent on August 8, 1955 (App. 676a), petitioner testified to no *openly extortionate* demands for money by Feiler after March 1955. Feiler's conversations with petitioner after that date, as testified to by petitioner, were not attempts to extort. In fact, it is petitioner's position that the uncontroverted evidence establishes that although Feiler was attempting to and did extort money from petitioner through the March episode, thereafter, beginning with the next episode in June, 1955, Feiler switched from extortion to entrapment by economic coercion. In view of the fact that petitioner never claimed that Drs. Howe or Grigware were attempting exortion as distinct from Feiler's *recital* to petitioner of the willingness of Howe and Grigware to accept bribes, and keeping in mind also that Feiler's testimony establishes June, 1955 as the date Feiler proposed that petitioner approach Howe and Grigware, the Jury could have found that Feiler ceased extorting in March 1955 and thereafter, simply acted as a "contact man" between petitioner and Grigware and Howe to arrange bribe of the latter two. See testimony of Feiler suggesting his role as "contact man" (App. 210a, 211a; also Supplemental Brief and Appendix p. 36sa).

[15] Analysis of the Michigan decisions discloses that the defense was originally recognized chiefly in order to vindicate a strong public policy against police solicitation or participation in crimes. This policy was held to outweigh the competing policy in favor of apprehension of criminals even though it is clear in a given case that the defendant has committed

(Continued on next page)

The facts in this case, accepting the jury determination on disputed issues necessary to its verdict, fully measure up to the test of entrapment first stated in *Sorrels* and reaffirmed in *Sherman*, that the "criminal conduct was the product of the *creative* activity of law-enforcement officials." For here, indeed, the State officials *created* and carried out the ingenious and well-planned scheme by which petitioner, instead of importuning, cajoling and engaging in hyperbolic efforts to extricate his business from an economic squeeze, committed the crime of bribery.

This is not the case of a person who has been engaged in an unlawful business or illegal activity such as the sale of narcotics; petitioner was, and for many years, had been engaged in the optical business. Nor were the State police and other State officials dealing with a known criminal or a person with a criminal record; petitioner had never been arrested or convicted (App. 391a).[16]

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an offense with the required criminal intent. Thus, in *Saunders v. People*, 38 Mich. 218 (1878) the conviction of a lawyer for unlawfully removing public records was reversed on ground of entrapment, where evidence established that defendant had requested a bailiff to assist the unlawful removal, and bailiff thereafter advised police, who thereafter trapped defendant in flagrante, aided by information furnished by bailiff pretending to work with defendant. See also *People v. Pinkerton*, 79 Mich. 110 (1889), where conviction of a woman for keeping house of ill fame was reversed where evidence established that police agents visited the "house" and engaged in intercourse with prostitutes there and that testimony of the agent formed the basis for defendant's conviction. See also *People v. Smith*, 296 Mich. 176 (1941).

[16] Cf *Sherman v. U. S.*, *supra*, where two earlier narcotic convictions were held insufficient to prove a readiness to sell narcotics. Also *U. S. v. Mathues*, 22 F2d 979, where the Court noted the distinction between the investigation of lawful and an unlawful business with respect to the application of the defense of entrapment.

That the petitioner had approached the shadowy edges of the crime cannot justify the action of the law-enforcement officials in pushing him over the edge. The relationship in a democratic society between the citizen affected by state action and the officials charged with enforcement of the law must leave a wide margin for citizen approach, protect and self-help.

This point was touched on in a Note in 28 Columbia Law Review, where the author commented:

> "* * * An offer of a bribe to a public official will not be regarded as entrapment. The offense is so grave, the evidence so difficult to obtain, the temptation so constant and recurring that a government is justified in testing its officers by a normal offer. But a government agent may not entrap a private citizen by demanding that a bribe be given. An incorruptible enforcement staff is capable of dealing with the bribe-giver whenever he appears; there is no need to seek him out. Furthermore, an innocent man, fearful of official retaliation, might readily yield to such a request. The Court in *United States v. Mathues, supra*, therefore properly held that an officer's suggestion he would accept bribes constituted entrapment." (At pp. 1073-4.)

This important aspect of the citizen-state relationship was brought out clearly in *U. S. v. Klosterman*, 248 F. 2d 191 (CA 3, 1957) where defendant taxpayer Klosterman and defendant Deeney, an Internal Revenue Agent were indicted and convicted of conspiracy to bribe federal officials to discontinue investigation of certain of Klosterman's tax returns. Upon learning from Deeney that an agent of Klosterman's had broached a bribe proposal to Deeney, King, Deeney's superior, urged Deeney, over a period of several months and against Deeney's recurrent

protests, to suggest to Klosterman, King's receptiveness to a bribe. Thereafter, upon Klosterman's offering King $5,000 apparently for the purpose of "working out" the Klosterman investigation, Klosterman and Deeney were arrested and convicted. The Third Circuit, sustaining the entrapment claim of both defendants in spite of a jury finding of no entrapment, reversed both convictions on the ground that the evidence as to both defendants established entrapment as a matter of law. But the Court reversed Klosterman's conviction with due process rhetoric, denominating it "shocking to justice * * *" because:

> "(Klosterman's) tax returns had been under investigation for an unusual length of time. During the period of investigation, Klosterman had numerous interviews with various agents and never once suggested an improper settlement of his tax liabilities. Thus far from evidence of a pre-disposition to commit this crime, this case presents affirmative evidence to the contrary. The lengthy investigation of Klosterman's returns without a decision to either prosecute criminally or to seek civil remedies must certainly have had the effect of causing him at least some measure of anxiety. This subtle *though, of course, unintentional conditioning of Klosterman would naturally have the effect of making him more susceptible to the persuasion of King through Deeney and Stafford.*" (At pg. 196.) (Emphasis added.)[17]

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[17] See also *U. S. v. Mathues, supra.* Two brothers were charged with bribing Prohibition Bureau agents investigating defendants' brewery. The evidence established that the first brother was directed by agents to obtain the second brother's approval of the first brother's offer to bribe agents. The agents did not conceal their identity and the second brother acquiesced in the bribe offer; the trial court, upholding the second brother's defense of entrapment as a matter of law, said:

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The development of the claim of entrapment as a due process defense in a criminal prosecution was presaged in the language of *Sorrells*—"unconscionable, contrary to public policy", "shocking to the sense of justice", "violation of the decencies of life". And in *Sherman* where the Court reiterated much of this language adding several "due process" phrases of its own to characterize the conduct—"means that violate rationally vindicated standards of justice," "certain police conduct * * * is not to be tolerated by an advanced society."

However, it was in *Raley v. Ohio*, 360 U. S. 423; 79 S. Ct. 1257, that this Court specifically held that State action, in convicting subpoenaed witnesses for contempt for refusing to answer questions which a State investigating committee had advised them they need not answer, constituted entrapment in violation of the due process clause of the Fourteenth Amendment.

The avowed plan of the State police and prosecuting official in inducing petitioner to come into Michigan for the purpose of having him offer a bribe to the optometric board, under the circumstances here disclosed, constituted entrapment; and the resulting conviction for a crime which

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> "There is, however, a broad distinction between cases of that sort and a case where a government agent whose duty it is to investigate and discover the commissions of offenses connected with an unlawful business in which a person is engaged, reveals himself as a representative of a bureau or department having charge of investigating and obtaining evidence concerning an unlawful business and offers himself as a participator in a different offense not connected with the business under investigation." (At p. 980.)

And see *Durham v. State*, 280 S. W. 2d 737 (Tex. Cr. App., 1955). The distinction recognized in *Mathes* was also approved in *28 Columbia Law Review*, 1067, 1073, 1074.

would not have been committed except for such entrapment, denied petitioner due process under the Fourteenth Amendment.

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

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Dated: Detroit, Michigan,
October —, 1960.

APPENDIX

OPINION OF THE MICHIGAN SUPREME COURT

People v. Ritholz
Decided June 6, 1960

SMITH, J. This appeal arises from a prosecution for corruptly offering money to influence the action of 3 public officers, members of the board of examiners in optometry.* It is not denied that money in fact changed hands. The defendant, however, asserts that the money was not offered with corrupt intent. He says that he paid it over to terminate a scheme of extortion. This the jury disbelieved. He was found guilty, a fine was thereupon imposed, and he was sentenced to imprisonment for a term of years.

The defendant was a partner in King Optical Company. This company had an office in Lansing adjacent to the office of Dr. E. L. Sanchick. It was the practice of King Optical Company to refer patients coming to it, in response to its newspaper advertisements, to any doctor in the city, "or to the doctor who leases space next door to us or adjacent to our office." The Michigan board of examiners in optometry (hereinafter called the board) had brought certain charges against Dr. Sanchick as a result of his relations with King Optical Company,† and it is with respect to defendant's alleged efforts to have the Sanchick case "washed out" by the board that much of the testimony is concerned.

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* CL 1948, §750.117 (Stat Ann §28.312).

† In *In re Sanchick*, 347 Mich 620, this Court reversed the order of suspension previously rendered against Dr. Sanchick for alleged unprofessional conduct.

The defendant had first met Dr. Feiler, according to the latter, in Chicago in 1949 or 1950. Since that time they had intermittent contacts. In October of 1951 they met in Chicago with respect to a patent matter. In the following month, November, Dr. Feiler was appointed to the board. The next meeting between defendant and Dr. Feiler was in 1952 or 1953. Dr. Feiler's version of this meeting is that it had to do with defendant's difficulties in his contact lens laboratory in Chicago, for advices concerning which he, Dr. Feiler, was paid the sum of $350. Defendant's version is that Dr. Feiler came to him, demanded money as the price of peace (with the Michigan board, of which he was now a member), and so received the said sum. Defendant made no report of this to the board, the Illinois police, the Michigan police, or any other law-enforcement agency.

Their next meeting occurred in 1953. Dr. Feiler testified that the meeting related to the sale of some contact lenses belonging to a Dr. Golden, that the sale did not eventuate, and that he was paid his travel expenses by Dr. Golden. Defendant's version was that this, also, was the occasion of further extortion, that Dr. Feiler had said, "You give me $500 or else I'll put you out of business," which sum was thereupon paid over. Again, there was no report by the defendant to the authorities of any jurisdiction of the demands allegedly being made upon him, now, apparently, as a matter of course.

In Chicago, in August or September of 1954, another meeting allegedly occurred. Although Dr. Feiler denies the meeting, defendant asserts that it was the occasion for another demand for money, specifically for $15,000, $5,000 for each of the 3 members of the board. This demand was allegedly overheard by a friend of the defendant, Dr. Brill, who testified to that effect. As before, no report of the demand was made to the police.

The Sanchick matter, concerning which the alleged bribe was paid, comes into the record in November of 1954. Dr. Feiler's testimony was that defendant called him, asked him about the Sanchick case and said "he would like to have this washed out." Defendant's version, again, is at variance. It was Dr. Feiler who called him, he says, and again it was a demand for money, this time for $15,000. Defendant resisted. He replied, he says, that he "wasn't going to be shaken down any more."

In January of 1955, Dr. Feiler testified, defendant again called him regarding the Sanchick case, stating, it was said, that it would be worth $3,000 or $4,000 to have it "washed out." Dr. Feiler testified that he responded that he could do nothing about it but defendant asked that they meet to discuss the matter. Dr. Feiler at this point notified the Federal bureau of investigation of the matter, who, in turn, we gather, notified the State police. When defendant and Dr. Feiler then met, on January 12, 1955, in the Sheraton-Cadillac hotel, the police had installed a microphone, and the conversation was monitored by them. Upon cross-examination the defendant admitted that he had at that time asked Dr. Feiler if he could do anything for Dr. Sanchick. When Dr. Feiler responded, at a later point, "I don't understand just quite what it is you want me to do," the defendant replied, "I want you to do just like anything else. You know what to do. Find a way to wash it out. Instead of the lawyers getting the money I give it to you. It's just as simple as that." The defendant further stated, in the course of their conversation, that if the board was going to push him (defendant) around that he was going to start a little pushing himself, as he had done in Indiana. There, he said, he had "filed a suit in Federal court for a million and a half, suing each member of the board and each member of the association and all of their officers

of the association personally, not as an association." He went on, describing his actions, "I wasn't very nice in Indiana. I was a bastard. I had the secretary of the board on the witness stand. I only started with him: I was going to keep him on for 3 weeks, day in and day out." He questioned Dr. Feiler thus: "If I start a number of suits like I did in Indiana, do they [the board members] scare pretty good?"

The next meeting of the defendant with Dr. Feiler in Detroit was late in March. On the 27th day of this month Dr. Feiler reported to the board members that defendant wished another meeting with him to discuss further the Sanchick case. This meeting was held at the Statler Hotel, the respective versions again opposing bribery (Feiler) against extortion (defendant). Although arrangements had been made to meet the next day, at the board meeting the following morning Dr. Feiler was advised by an officer of the State police, and the board, to have no further contact with the defendant. Nevertheless he did meet with defendant at a clothing store in Detroit, at which time and place the defendant put in his pocket an envelope later found to contain the sum of $500. This incident Dr. Feiler did not report to any proper authority until the following September when he turned the money over to the State police and informed an assistant attorney general of the matter. For his derelictions in connection therewith he was later removed from office by the governor.

Various telephone conversations having been had between Dr. Feiler and defendant, and reported by Dr. Feiler to State police officers, he was asked to attend a meeting in Lansing to discuss the matter with an assistant attorney general. Dr. Feiler stated in part that he had been requested by defendant "to get in touch with him" and he was authorized to call defendant in Chicago. This call

was monitored by the State police. Dr. Feiler asked if he (defendant) "was going to bring the stuff with him," to which defendant replied, "I'm not paying for anything in advance, not until the goods are delivered." Defendant said he was going to be in Detroit that week end and would contact Dr. Feiler later.

On Sunday, August 7th, defendant prepared to meet with Dr. Feiler in the Statler hotel in Detroit. He had hired Pinkerton detectives and was prepared to record the transaction. Dr. Feiler, however, acting under instructions, did not appear but, rather, telephoned excuses and set up a meeting at the Olds hotel in Lansing for the following night. To Dr. Feiler's inquiry as to whether defendant was prepared "to take care of this thing" the next night, defendant responded that he was not going to Lansing for a joy ride. Defendant thereupon instructed the Pinkerton detectives to meet him the next night at the Olds hotel in Lansing and to use a suite he had reserved.

We now come, at long last, to the happenings at the Olds hotel on the night of August 8th, the date and place of the alleged offense of bribery. Dr. Feiler, the other members of the board, and defendant were in one room. In an adjoining room were the Pinkerton detectives hired by defendant, with their tape recording equipment. In a room nearby were the State police officers. Defendant took charge of the meeting. He said that they were meeting "to see if we can work something out so we will have a little bit of a truce." He made reference to the Sanchick case, and to the antitrust suit he had filed. He spoke of his lawyers in the latter matter and how they were "cleaning up on both of us." We continue with the record. The defendant is testifying on cross-examination:

"*Q.* And did you then say, 'I am going to spend money on lawyers. There is no question about it. I would rather spend it some other way. Do you want me to discuss it with you gentlemen? Or with Julian'?

"*A.* Yes, sir.

"*Q.* And did Dr. Feiler say, 'They are here, and they understand the deal. I want to get out of here. I am not going to stay all night'?

"*A.* Yes, sir.

"*Q.* And did you say, 'All right. We can finish in 5 minutes. I am prepared to pay you $5,000'?

"*A.* Yes, sir.

"*Q.* And did Dr. Grigware say, 'Apiece?'

"*A.* Pardon?

"*Q.* Did Dr. Grigware say, 'Apiece?'

"*A.* Yes, sir.

"*Q.* Asking a question, and did you say, 'No. 5,000 is the money I've got alloted to spend. Rather than spending it on lawyers, I would rather give it to you'?

"*A.* Yes, sir.

"*Q.* And did Dr. Grigware say, 'What do you want in return now?'

"*A.* 'Yes, sir.

"*Q.* And did you say, 'I don't care who gets it or how it is divided. You know what I mean. In return? I want you to wash out this case. Get this Sanchick case washed out.'

"*A.* Yes, sir.

"*Q.* And did Dr. Howe then say, 'Then what do we get in return?'

"*A.* Yes, sir.

"*Q.* And did you say, 'What?' and did Dr. Howe say, and repeat, 'What might we get in return?'

"*A.* Yes, sir.

"*Q.* And did you say then, 'Well, the Federal case will be washed out too'?

"*A.* Yes, sir."

Additional discussion ensued. Mr. Ritholz said that he would give them "2,000 apiece, make it an even 6," but that he didn't have the entire sum with him. We continue with the testimony of the defendant on cross-examination:

"*Q.* And did Dr. Grigware say, 'No, I should say you don't want to wire it to me' and did you say, 'No, no, to myself. I will have somebody on the plane. I tell you what. One of my cousins, I don't know if you know him, has to go to Windsor anyway, so he can fly up here. We are moving our office to Windsor. So he was going there Wednesday morning. Let him go tomorrow. He will bring the dough. Now, where do you want me to give you the rest of the dough? Here's 300 bucks just to show good faith is all, bind the bargain'?

"*A.* Yes, sir.

"*Q.* And at that point did you hand the money?

"*A.* Yes, sir.

"*Q.* And whom did you hand it to?

"*A.* Dr. Feiler.

"*Q.* And what did Dr. Feiler do with it?

"*A.* He gave $100 each to the other 2 men.

"*Q.* And what did Dr. Howe do with his $100 bill that he had in his hand?

"*A.* I think he put it on the couch.

"*Q.* Back toward you?

"*A.* I don't exactly remember where he put it. You see, I was sitting on a couch, he was sitting on a chair, facing that way (indicating).

"*Q.* Well, what did you do with it?

"*A.* Give it back to him.

"*Q.* And did you say something when you gave it back to him?

"*A.* I don't recall.

"*Q.* Did you say that you wanted him to have it or some words to that effect?

"*A.* Yes, sir. Yes, sir."

At the close of the meeting the board members turned over to the State police the $100 bills they had received. The officers thereupon went to the Ritholz suite, introduced themselves, were admitted, and arrested defendant upon a charge of bribery. Detective Sergeant Chrispell of the State police testified that at this juncture defendant "went to another door in the room and pounded on the door, and at that time the door opened and there were 3 men standing there."

The defendant was thereupon taken to the State police headquarters and ultimately brought to trial as hereinabove noted.

It is first asserted to us that, "In view of *In re Sanchick*, 347 Mich 620, defendant could not lawfully be adjudged guilty of the criminal offense of bribery defined in section 117 of the penal code." In the case cited the Michigan board of examiners in optometry heard a complaint that Dr. Sanchick had employed King Optical Company as a "capper" or "steerer," in violation of the statute regulating the practice of optometry. The board found that Dr. Sanchick had violated the statute, and suspended his license. On appeal, the circuit court affirmed. Appeal was taken to this Court, appellant urging that th re was no evidence to support the finding of the board that he (Dr. Sanchick) employed the King Optical Company as a "capper" or "steerer" as barred by the legislation enacted.

Our holding was that the record did not support the allegation made and we reversed the order of suspension.

The above having been our disposition of the *Sanchick' Case*, appellant argues to us that defendant could not lawfuly be found guilty of paying money to board members "to induce the board to do the very thing which this Court itself enjoined upon them to do," *i.e.*, dismiss such complaint. Related to this issue is that involving the composition of the board. Defendant sought to show that the members of the board were in economic competition with him, had a pecuniary interest in the matter submitted to them, and hence that the act of the legislature creating such board was unconstitutional under the asserted principle of *Milk Marketing Board* v. *Johnson*, 295 Mich 644. From this defendant concludes that "defendant could not as a matter of law be guilty of bribing a member of such an unconstitutionally created board." To this point defendant cites *State* v. *Butler*, 178 Mo 272 (77 SW 560), a case arising out of the St. Louis municipal scandals around the turn of the century. It was there held that since the ordinance purporting to grant the board of health authority to award a contract for the removal of garbage was illegal and void, money offered a member of the board to influence his judgment in the matter did not constitute a bribe.

The above holding, it is clear, is not the law of this jurisdiction. As we said in *People* v. *McGarry*, 136 Mich 316, 322: "The validity of the act proposed is not the test," nor is the legal sufficiency of the action taken by the board. Here the defendant did insist upon and attempt to obtain the dismissal of the proceedings against Dr. Sanchick, the precise evil attempted to be guarded against in the bribery statutes, namely, the corruption of public of-

ficials, the attempt to pervert the exercise of honest judgment in the discharge of their duties. The gist is the attempt to so pervert and corrupt the effort to influence the official judgment by money or reward. It would be a monstrous and shameful doctrine that judgment in the courts or boards of this State might be purchased with insolence and impunity if the law under consideration were later declared unconstitutional, or, indeed, if some flaw were found to exist in the authorization or composition of the court or board before which a matter is heard. *Commonwealth v. O'Brien*, 107 Pa Super 569 (164 A 360). We do not, of course, in so holding, imply any illegality in fact in the board's composition, nor do we concede defendant's assertion that our holding in the *Sanchick Case*, *supra*, meant, as appellant asserts, that "the board had no jurisdiction to entertain" the matter.

It is urged, also, that the police "illegally searched defendant's rooms after his arrest and illegally seized his property consisting of a tape recorder and tape, therefrom." The trial court's denial of defendant's motion to suppress such evidence is alleged to be error. It is argued that the property seized was merely evidentiary material, not an instrumentality of crime or contraband.

It is to be noted that the arrest of defendant Ritholz was made only after the police had received direct evidence from the bribe recipients of the attempt made, and, in fact, were in possession of the three $100 bills paid by defendant. The arrest was thus made pursuant to statute (CL 1948, §764.15 [Stat Ann 1954 Rev §28.874]) authorizing an arrest without warrant when a felony has been committed and the officer has reasonable cause to believe that the person arrested has been guilty of the commission thereof.

Such being the case it is clear, as we held in *People* v. *Harris*, 300 Mich 463, 465, quoting *People* v. *Cona*, 180 Mich. 641, 652, that:

"'The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested.'"

This holding is correctly applied to the circumstances before us. An arrest, in fact, may well be an idle ceremony if the police seizure of evidence of the commission of the crime itself (particularly, as here, an electro-mechanical reproduction thereof) is held to be "unreasonable." The test of reasonableness, as was held in *Harris* v. *United States*, 331 US 145, 150 (67 S Ct 1098, 1101, 91 L ed 1399, 1405) "cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.'" Moreover, we do not overlook the evidence that the tape machine here involved was voluntarily surrendered by the Pinkerton men, and that they made no complaint with respect thereto. *Cf. Holt* v. *United States* (CCA 6), 42 F2d 103. If they are regarded merely as agents of defendant, and their possession his, their voluntary surrender thereof was also his, as well as their surrender of the suite, which had been rented at his order. It is our conclusion that neither the receipt of the tape by the officers, nor the reference thereto made by the prosecution in cross-examining the defendant were violative of his constitutional rights.

Much of the additional error urged upon us involves the assertion that the payment of money to the public officers, above described, was not made with "corrupt intent" but rather with "the innocent purpose of terminating a long

series of extortions practiced upon" the defendant. It is asserted, moreover, that "bribery and extortion are mutually exclusive crimes," which the court refused to recognize, thereby committing error not only in the receipt of evidence but in the charge given. We will first examine such alleged errors.

In a case such as we are discussing, the crimes of bribery and extortion are alike in that each involves the payment of money to a public official. There, however, the similarity ends. Extortion is the exaction of money, under color of official rights, from an unwilling payor.* In bribery, on the other hand, the payor voluntarily presses his money upon the public official hoping thereby to influence his official action. Thus, as the Oklahoma criminal court of appeals pointed out in *Finley* v. *State*, 84 Okla Crim 309, 320 (181 P2d 849, 856): "While bribery and extortion are distinct offenses, the same facts may be the basis for the charge of either extortion or bribery." It depends upon the intent with which the money is paid. In *People* v. *Feld*, 262 App Div 909 (28 NYS2d 796), the appellant was indicted on the charge of extorting money from an employer by threatening to foment a strike among its employees. The defense was that the employer, instead of being a victim of extortion, had bribed the defendant (a representative of the labor union). The court speaks with entire accuracy when it states:

"A question of fact was presented and the appellant was entitled to have the jury instructed that if the employer were guilty of bribery, the appellant could not be guilty of extortion. The 2 crimes are mutually exclusive."

The word to be stressed in the above is the word "guilty." The mere fact of payment alone may be ambiguous, sus-

* See CL 1948, §750.214 (Stat Ann §28.411).

ceptible of interpretation either as bribery or as extortion. It is for the jury to determine which of the offenses, if either, has been committed, of which one there is evidence of "guilt." Only in that sense are the 2 crimes exclusive.

The court below, on the matter of intent, charged in part as follows:

"Now, it is the general claim of the defendant that he did agree to pay $6,000, that is $2,000 each to Drs. Feiler, Howe, and Grigware, on August 8, 1955; that he paid each of these men $100 to apply on that figure; but that his said agreement and the payment on account was made without any corrupt intent to influence the board in the case of Dr. Edwin L. Sanchick, and that the agreement was made by the defendant solely to get the evidence against these public officials for use in exposing them, and that Dr. Feiler had been extorting money from the defendant and that he had led the defendant to believe that Drs. Howe and Grigware were interested in doing the same."

And, also:

"Whether or not Dr. Feiler had extorted money or was attempting to extort money from the defendant is not the question that you are to decide by your verdict, but you, of course, may use your decision on that question in determining the defendant's intent in the bribery charge."

Although isolated sentences of colloquy or charge may support appellant's allegations of error in this respect, we are not persuaded that the charge as a whole was unfair to defendant or misstated the law. *See People v. Coleman*, 350 Mich. 268, 282.

Complaint is made, also, relating to the introduction of evidence. It was the claim of the defendant that in paying money to the public officials in the Olds hotel, he did so

"for the innocent purpose of ending their continued practice upon him of extortion." He insists that he had no "corrupt" intent and that none was shown. He paid, he says, innocently, to obtain evidence of extortion for submission to the proper authorities in order that he might no longer be made the victim of the defendant's evil machinations. It was a necessary step in his proofs, he asserts, that the series of extortions down through the years be shown, and in this showing he says that he was hampered and restricted by the court's rulings.

Corrupt intent is, of course, a necessary element in the crime of bribery. It is not necessary, however, as we pointed out in *People v. Vinokurow*, 322 Mich. 26, 30, 31, "that there be direct testimony as to the intent required in the statute. If such were the case it would be almost a rarity when a conviction could be obtained under this kind of a statute." The intent is to be gathered from the acts done and the circumstances under which they were done. Here the crime is alleged to have been committed in the Olds hotel. The testimony of what was said and done there is utterly barren of any intimation of previous extortions. The defendant was an experienced businessman, trained in the law, and well versed in the uses of the law, as his various anti-trusts suits amply demonstrate. That this man, recording the transaction by his own paid agents, would have made no reference in his lengthy discussion, with the board members, of the past extortions of at least one of their number, evidence of which he claimed to be gathering, is inherently incredible. That his reluctance to do so stemmed from any moral or legal scruples over making such criminality a matter of record is, itself, equally incredible. He was blunt and to the point respecting his payments. "In return for the money I want you to wash out this case."

Get this Sanchick case washed out." He would also dismiss the antitrust suit which he had instituted against the board members and the Michigan Optometric Association.

Upon such record the court might well have held completely irrelevant to the charge at hand any testimony whatever of past alleged extortions. There was nothing ambiguous about what was to be done, or what was sought in return. Nevertheless the court did permit the introduction of evidence hereinabove set forth, going back to the first meeting between Dr. Feiler and defendant in 1949 or 1950, the meeting in October of 1951, the next meeting, following Dr. Feiler's appointment to the board in November of 1951, subsequent meetings in 1953, and a meeting in August or September of 1954 in Chicago. With respect to these meetings, as we have seen, 2 different versions were presented to the jury: that of Dr. Feiler to the effect that they were of a legitimate business nature, that of the defendant that they were extortionate in character.

We will assume, without conceding, that the Olds hotel incident was sufficiently ambiguous as to require, in fairness to the defendant, the showing of a system of extortionate demands by Dr. Feiler and the board. This may be accomplished through evidence of past acts material to the charge of systematic extortion. The Arkansas supreme court in *Butt v. State*, 81 Ark. 172, 181, 182 (98 SW 723, 726, 118 Am. St. Rep. 42), in holding that evidence of prior acts of bribery was admissible, stated the applicable principle in these words:

"You might as well expect that one should be able to judge correctly the merits of a play, and of the motives and conduct of the actors as displayed therein, by witnessing only the last scene of the last act, as to expect, where the crime under investigation is part of a connected scheme,

that the jury should be able to determine the motives of the defendant and judge correctly of his guilt or innocence without any knowledge of the origin of the crime or the circumstances and motives that led up to it. The law does not blindfold courts and juries in that way, and it is always competent to show the beginning as well as the end of the criminal transaction."

This, it will be noted, does not require the aid of the intent statute,* the purpose of which, as we held in *People v. Rose*, 268 Mich. 529, 526, "was to do away with the rule as to proof of other offenses and permit the introduction of such testimony even though it might show or tend to show the commission of another prior or subsequent offense by defendant." It is just at this point that defendant makes his thrust at the introduction of evidence relating to the system of extortions. He says it was received with restrictions as to its use, grudgingly, sometime with disparaging comment as to its materiality, and at times only as bearing upon the credibility of Dr. Feiler. The short answer to all of this is that it was, nevertheless, received, and in such detail that, in our opinion, the jury was given a reasonably accurate presentation of the claims of both the State and the defendant. Even with respect to evidence of system, the relevance of events far removed in time or circumstance must lie within the discretion of the court and we are not persuaded that prejudice arose either from ex-

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* CL 1948, §768.27 (Stat Ann 1954 Rev §28.1050), reads:

"In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another prior or subsequent crime by the defendant."

clusion or reluctant admission. Assuming, as we do, that evidence of a system of extortion was admissible, error would lie in receiving it as bearing solely upon credibility, and not as substantive proof, but we think the court adequately covered the matter in its charge to the jury in which it said:

"Now, it is the general claim of the defendant that he did agree to pay $6,000, that is, $2,000 each to Drs. Feiler, Howe, and Grigware, on August 8, 1955; that he paid each of these men $100 to apply on that figure; but that his said agreement and the payment on account was made without any corrupt intent to influence the board in the case of Dr. Edwin L. Sanchick, and that the agreement was made by the defendant solely to get the evidence against these public officials for use in exposing them, and that Dr. Feiler had been extorting money from the defendant and that he had led the defendant to believe that Drs. Howe and Grigware were interested in doing the same.

"As stated, these general claims as far as the defendant is concerned and the court's statement of them, is not to be taken by the jury to limit the consideration of other claims which have been offered and received in evidence during the trial.

"As I have stated to you before, the gravamen of the offense in this particular case, in view of the admissions of the defendant regarding the agreement and the payment, is the corrupt intent to influence that board in the Dr. Sanchick case, if there was any corrupt intent. You must determine that question to reach your verdict.

"There has been evidence offered and received on the question of whether or not Dr. Feiler was extorting money or trying to extort money from the defendant by threatening his business. This evidence has been admitted for your

use in determining the defendant's intent at the time of the agreement and the payment of August 8, 1955. That is the only purpose of such evidence. Whether or not Dr. Feiler had extorted money or was attempting to extort money from the defendant is not the question that you are to decide by your verdict, but you, of course, may use your decision on that question in determining the defendant's intent in the bribery charge. * * *

"The court also wishes to state that during the course of the trial on at least 1 occasion, and maybe on more, the court ruled that certain testimony regarding the affairs between the defendant and Dr. Feiler was only admissible as bearing upon the credibility of Dr. Feiler, and that I wish to change. That testimony may be also used by you, if you deem it useful, for the purpose of determining the question of extortion in this case."

We have examined the remainder of the alleged errors made, including those relating to evidentiary matters, the charge, and to the prosecutor's cross-examination of the defendant, as well as his final argument, and find they are without merit. Some of the phraseology of the charge might have been more artistic, and the prosecutor might at times have been more gracious, but no trial ever conducted is wholly without blemish. Technical error, however, is not our test. We must be persuaded that the errors complained of were so gross as to have deprived defendant of a fair trial, that his conviction was, in truth, a miscarriage of justice. We are far from so persuaded. Appellant argues that the evidence does not sustain the verdict of defendant's guilt beyond a reasonable doubt. The evidence thereof, on the contrary, may be regarded as overwhelming. Defendant's account of the extortions prac-

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* See CL 1948, §769.26 (Stat Ann 1954 Rev §28.1096).

ticed on him over a period of years, suffered by him in silence, verge on the incredible. He argues that he did not complain to the police of them because his word alone would not have been effective. A citizen's failure to report crime is not excusable by reason of such assumption on his part. We note, also, that at no telephone conversation (between Dr. Feiler and defendant) monitored by the State police do we find complaints of past extortions by defendant, though he testifies he made them in abundance at conversations unheard by others. Thus the conversation held on January 12, 1955, in the Sheraton-Cadillac hotel in Detroit, heard in its entirety by the police (and the first monitored conversation) has a significance beyond that of its actual content. Up to this point defendant's versions of the meetings held with Dr. Feiler have been replete with his (defendant's) protests against the "shakedowns" to which he was allegedly being subjected. Yet, although we have examined the police versions of this conversation with care, the testimony of the officers, Van Wie, Bogan, and Chrispell, we find it to be utterly barren of reference to past extortions, shakedowns, or other coercion practiced upon defendant by Dr. Feiler. Rather, it is defendant who is aggressively demanding that Dr. Feiler have the Sanchick case "washed out," not only for a money reward, but, if not, under peril of receiving the same kind of legal harassment as defendant had, in his own words, exercised against officials of the State of Indiana. The picture, in short, is not that of a public officer exercising the powers of his office for purposes of intimidation and coercion, but rather that of a citizen demanding that official action cease, both for reward and under threat.

The Olds hotel incident was, as we have noted, likewise barren of such accusations on the part of the defendant, though his bargaining was frank enough to include other

considerations, including the dismissal of the Federal case by defendant. Finally, regardless of the merits or demerits of Dr. Feiler, we do not overlook the fact that money was offered to the other members of the board, whose connection with any extortion was far more tenuous than that of Dr. Feiler, if indeed, it can fairly be said to have existed at all. The case was carefully tried by competent counsel. The evidence adduced against defendant was ample to justify the verdict reached. We find no substantial error in the case and no need to discuss additional claims of error.

Affirmed.

DETHMERS, C. J., and KELLY, BLACK, and EDWARDS, JJ., concurred.

CARR, and KAVANAGH, JJ., did not sit.

SOURIS, J., took no part in the decision of this case.